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LEGAL OPINION REGARDING SB 369

RELEVANT BACKGROUND FACTS

The management of the Dungeness crab fishery in California, Oregon, and Washington has historically been regulated by the individual states with coordination through the Tri-State Management planning process. Each state's Dungeness crab fishery includes numerous non-resident permit holders. What was once primarily a local fishery is now very much a West Coast-wide fishery for a product that has generated increased demand globally and is extensively traded in global markets. Crab are harvested both inside three miles of state waters and in the federal EEZ adjacent to state waters. Virtually all other commercial fisheries of this type are managed through a federal Fishery Management Plan (FMP) adopted by a regional fishery management council.

While there have been periodic efforts to adopt an FMP for the West Coast Dungeness fishery by the Pacific Fishery Management Council (PFMC), the fishery remains state-managed. However, in 1996, the federal Magnuson-Stevens Act (MSA) was amended to include provisions related to the Dungeness crab fishery to ensure uniform equal application of regulation in both state and federal waters without regard to a vessel's state of origin to facilitate coordinated tri-state management of the fishery. As a complement to the interstate management authority for the crab fishery provided by the MSA, each of the three coastal states has adopted laws and regulations that prohibit its licensees from fishing in the EEZ of another state without a permit from that state.

California, like Oregon and Washington, allows commercial fishing licenses to be issued to both residents and non-residents. *See* Fish & Game Code, § 7857(a). Non-residents pay significantly higher fees for their license than do residents. Resident commercial fishing licenses for 2012-13 cost $130.03 while non-resident commercial fishing licenses are approximately three times higher ($385.75). Similarly, annual fees for commercial boat registration differentiate in fee amount between residents and non-residents. Residents pay $338.75 while non-residents pay three times that amount ($1,002.25).

California's Dungeness crab fishery requires a "limited entry and restricted access permit." California also has differential fees for residents and non-residents for Dungeness crab

vessels. California charges $273 for residents for a Dungeness crab vessel annual license which allows the owner of a commercial fishing vessel using Dungeness crab traps to take Dungeness crab for commercial purposes. California charges roughly twice that amount ($538) for a non-resident owner. Significantly, the State also requires a special permit "to take fish in California waters and deliver to a port outside of California;" the annual fee is $20.34. That law was adopted in 1938 by initiative. The practical effect of this permit is to allow commercial fishermen fishing in California waters under a California non-resident crab permit to land their crab in Oregon or even Washington. This reportedly occurs regularly, especially by those California Dungeness crab non-resident permit holders operating out of the Brookings area.

In 2008, the California Legislature created a Task Force (SB 1690) "to review and evaluate Dungeness crab management measures, with the objective of making recommendations related to Dungeness crab to the Joint Committee on Fisheries and Aquaculture of the Department of Fish and Game and Fish & Game Commission by January 15, 2010." A principal focus of the Task Force was to study and recommend the propriety of a crab trap/pot limit scheme similar to those earlier adopted by Oregon and Washington. Such schemes serve to reduce the impacts of over-capitalization in the fishery by limiting the number of pots/traps a vessel may fish, thereby providing a greater opportunity for historic participants in the fishery to sustain their livelihoods in what has proven to be a valuable and productive, sustainably-managed fishery.

Nothing in the language of SB 1690 suggested that recommended measures, including crab trap limits, would limit access or use as a criterion for establishment for crab trap limits, only California landings of Dungeness crab. Nonetheless, the Task Force thereafter voted to recommend a tiered pot limit program using only California landings, but also recommended an AG's opinion as to whether the State was required to consider landings made by permit holders fishing in other states where those landings were made under a separate permit. Interestingly, the Task Force apparently ignored altogether out-of-state landings made by California permit holders under their California permits. No formal AG's opinion was ever obtained.

Following completion of the Task Force's work, a successful effort led by Sen. Evans resulted in the passage of SB 369 in the 2011 Legislature. SB 369 established a seven-tier crab trap/pot allocation scheme based only upon landings made in California in the five seasons prior to the 2009 season with each of the top six tiers limited to 55 permits, and the tiers ranging from 500 pots at the top tier to 175 pots at the bottom level. By considering only landings made in California during the control period selected for landings (November 15, 2003 to July 15, 2008) and because of the cap on the number of permits in each tier, the practical effect of the law is to relegate a significant number of non-resident California permit holders to lower tier status,

thereby preventing those non-resident permit holders from meaningfully participating in the California fishery.

The effective date of the crab trap limit legislation is March 31, 2013. The legislation provides that there is an opportunity for this pot limit scheme to change, but only if there is a "consensus" in the Dungeness crab industry in California. Consensus requires 15 out of 22 members of the Task Force to support the changes. There is only one non-resident permit holder on the Task Force, and there was no non-resident on the Task Force created by the 2008 legislature to study the issue and make recommendations even though the legislation required that there be one.

A review of the legislative history and the arguments in support of SB 369 establishes clearly that protecting California's resident permit holders from competition by non-residents was a primary aim of the Bill. Sen. Evans, the Bill's sponsor, stated that its purpose was to "provide the platform for ongoing work with Crab Fishery stakeholders to craft a Bill that will help conserve the resource, meet the regulatory requirements of the Department of Fish & Game, keep unneeded gear out of the water, and put a halt to the annual cross-border race for crabs that threatens the livelihoods of our fishermen." These objectives are entirely appropriate and consistent with the objectives of the pot limit schemes adopted in Oregon and Washington, but the express mention of a goal to "put a halt to the annual cross-border race for crabs that threaten the livelihood of our [California] fisherman," also signaled the economic protectionist intent of the legislation.

Other portions of the legislative history emphasized the economic protectionist sentiment behind the Bill. While the history noted that "both Washington and Oregon have recently implemented **similar** 'tiered' programs to limit total crab pot deployment," it made no mention of the fact that Washington and Oregon's programs considered all tri-state landings in establishing their tiers. As if to emphasize the intent to protect California resident permit holders, the history provided that:

> This Bill will reduce the amount of derelict gear in the water, which will have both increased safety and environmental benefits, and **protect California's crab fishery from unfair competition from large, out-of-state boats that are limited in their own states**.

It was noted that the Crab Boat Owner's Association of San Francisco also supports this Bill which they emphasize "will ensure the long-term sustainability of the California crab

fishery, **give the State's fishermen the ability to compete more fairly with out-of-state fishermen**, reduce the amount of gear in the water, and resolve other management issues."

There does not appear to be any mention or recognition of the fact that California law had authorized and licensed its permit holders to land out-of-state for decades, that the language of the Bill would necessarily adversely affect the livelihoods of those California permit holders, likely all of whom are non-resident permit holders. And while the fact that Oregon and Washington had already adopted "similar tiered systems" was expressly referenced as an additional reason for the Bill, no mention was made of the fact that, unlike Oregon and Washington, California was limiting their landings in determining pot limits to California landings only. Significantly, all of the lawful and proper objectives of adopting a trap/pot limit system could have been achieved by adopting a system that was, in fact, "similar" to the adoption by Oregon and Washington – systems that considered all landings associated with the permit and/or the permitted vessel during the qualifying seasons in all three states. This restrictive feature of SB 369 renders it vulnerable to legal challenge as explained below.

LEGAL ANALYSIS

Magnuson-Stevens Act (MSA)

The authority established under the Magnuson-Stevens Act contained in 16 U.S.C. § 1856 has two provisions that must be observed by all three states in their laws and regulations regarding the Dungeness crab fishery: Subsection (b) provides:

> Any law or regulation adopted by a State under this section for a Dungeness crab fishery … shall apply equally to vessels engaged in the fishery in the Exclusive Economic Zone and vessels engaged in the fishery in the waters of State, and without regard to the State that issued the permit under which the vessel is operating.

And subsection (c) provides that:

> Limitation on enforcement of State limited access systems.
>
> Any law of the State of Washington, Oregon or California that establishes or implements a limited access system for the Dungeness Crab Fishery may not be enforced against a vessel that is otherwise legally fishing in the exclusive

economic zone adjacent to that State and that is not registered under the laws of that State, except the law regulating the landings.

Collectively, these two provisions were interpreted by Oregon and Washington to prohibit discrimination against non-resident permit holders from any of the three States and led to the decision by Oregon and Washington to allow for consideration of out-of-state landings in their pot limit allocation systems.

The chief source of vulnerability for the California law under the MSA is the requirement that only California landings be considered in establishing a permit holder's crab trap tier limit and the lack of reciprocity with the crab pot limits schemes adopted by Oregon and Washington. Oregon's crab pot limit allocation system expressly recognized Washington and California landings in determining eligibility for each tier of its pot limit system. *See* OAR 635-007-1015(1)(g)(E)(1) and WAC 220-52-040(13)-(15):

California, by not considering landings made by its permitted vessels in Oregon and Washington in its seven-tier "crab trap" allocation system, is obviously discriminating against those California permit holders with Oregon and Washington landings by excluding consideration of their non-California landings, thereby relegating those permit holders – primarily, if not exclusively, non-residents of California -- to a substantially reduced number of "trap tags."[1]

The qualifying periods established by all three states include periods of time in which permitted vessels from all three states were fishing in the EEZ off each state. As a consequence, the adoption of a pot limit scheme based upon only in-state landings would not "apply equally to vessels engaged in the fishery in the EEZ and in Oregon waters." This fact was expressly noted in *Marble v. Dept. of Fish & Wildlife*, 234 P.3d 1062 (2008). The simple way around this was to enact a pot limit scheme that allowed all tri-state landings by each permit holder to be included when establishing a particular pot limit.

Even though Oregon and Washington, relying upon the MSA, elected to allow consideration of all tri-state landings in establishing their pot limit allocation systems, a close reading of the two applicable provisions may not, strictly speaking, require each of the three states to allow consideration of all landings in other states in their crab pot limit systems, but,

[1] While there is an appeal process established for allocations, the criteria used for appeal are restricted to "… unusual circumstances and that these circumstances constitute an unfair hardship, taking into account the overall California landings history with the added requirement as indicated by landing receipts associated with the permit." In other words, even the appeal process looks only at California landings.

when read together, it does provide an argument that those catches made in the EEZ adjacent to that state during the control period should be considered ("equal application") even if the catches were delivered in Oregon or Washington under a permit issued by those states to the same California permit holder (without regard to the state that issued the permit under which the vessel is operating). For example, a vessel owner holding a California permit fishing in the EEZ off northern California who chose to deliver his pre-2009 catch to Brookings or Charleston/Coos Bay, or even into Westport or the Columbia River, could argue that California thereby violated the MSA by not considering those landings in establishing his tier limit.

Finally, it could also be argued that the consideration of only California landings in establishing tier limits, as a practical matter, serves to implement a limited access system for the Dungeness crab fishery against non-resident vessels legally fishing in the EEZ adjacent to California, something expressly forbidden by subsection (c) of § 1856 of the MSA.

THE CALIFORNIA LAW VIOLATES THE COMMERCE CLAUSE

The Commerce Clause of the Constitution (art. I, § 8, cl. 3) vests in the Congress the power "[t]o regulate commerce with foreign nations, and among the several States ...." While the Clause has the "positive" effect of vesting certain powers in the Congress, it also has a "negative" or "dormant" side whose effect is to "den[y] the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 128 L.Ed.2d 13, 20 (1994); *see also Maine v. Taylor*, 477 U.S. 131, 137 (1986).

Under the Commerce Clause, there is a two-step analysis of state legislation. *See generally Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1011-12 (9th Cir. 1994). First, the court must consider whether the law "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). "The guiding principle in determining whether a state regulation discriminates against interstate or foreign commerce is whether either the purpose or the effect of the regulation is economic protectionism." *Pacific Northwest Venison Producers v. Smitch, supra*, 20 F.3d at 1012. If a restriction is discriminatory, *i.e.*, protectionist, it is virtually "*per se* invalid". *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981).

The burden falls on the state in such an instance to demonstrate "both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available

nondiscriminatory means." *Maine v. Taylor, supra,* 477 U.S. at 138, *quoting Hughes v. Oklahoma,* 441 U.S. at 336; *Atlantic Prince, Ltd. v. Jorling,* 710 F. Supp. 893 (E.D.N.Y. 1989); *United States v. Hagen,* 782 F. Supp. 1351, 1361 (D. Neb. 1991).

The California law discriminates against interstate commerce because it effectively penalizes those California permit holders who sold their crab in interstate commerce and it is evident from the legislative history that the purpose of that provision of the law restricting landings considered in establishing the permit holder's trap/pot limit tier only to California landings was economic protectionism.

The first step in evaluating state law measures under the dormant Commerce Clause "is to determine whether it regulates evenhandedly with only 'incidental' effects on interstate commerce or discriminates against interstate commerce.'" *Oregon Waste Systems, supra,* 511 U.S. at 99; *Birth Hope Adoption Agency, supra.* "A state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders." *Oregon Waste Systems, supra,* 511 U.S. at 128.

The U.S. Supreme Court has said that the dormant Commerce Clause reflected the Framers of the Constitution's firm belief that in order for the new nation to succeed, it "would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States of the Articles of Confederation." *Oregon Waste Systems, supra,* 511 U.S. at 98; *Hughes v. Oklahoma,* 441 U.S. 322, 325-26, 99 S.Ct. 1727 (1979).

> When a law appears to discriminate against out-of-state interests "facially" in its practical effect or in its purpose, it will only survive judicial scrutiny if a defendant can show that (1) it is demonstrably justified by a valid factor unrelated economic protectionism and (2) there are no non-discriminatory alternatives adequate to preserve the local interests at stake.

Environmental Tech. Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996); *Oregon Waste Management, supra*; *Oldens v. Gilmore,* 87 F. Supp. 2d 536, 542 (E.D. Va. 2000). The California law's exclusive reliance on California landings should not survive that scrutiny for either criterion. I do not believe it is justified by anything other than economic protectionism and Oregon and Washington's regulatory pot limit allocation systems in which landings in all three states were considered in establishing tier limits show clearly that there are non-discriminatory alternative measures that could have been adopted (*i.e.*, count all landings of crab regardless of state of landing when establishing pot limits).

The negative or dormant common clause has been interpreted several times within the commercial fisheries context. In *Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893 (E.D.N.Y. 1999), the court ruled that a New York statute prohibiting boats longer than 90' from fishing in New York waters was unconstitutional and therefore invalid. The court held that although the statute was facially neutral on its face, it was discriminatory in practical effect because virtually all of the longer vessels were from out-of-state. The state failed to show that the length limit on fishing boats served a legitimate local purpose in environmental protection rather than economic protectionism and the court upheld the grant of declaratory and injunctive relief from enforcement of the law. The court held that the evidence bore out "plaintiff's assertion that the statute is discriminatory because it 'bears disproportionately' – in fact, almost exclusively – on out-of-state fishers," citing a U.S. Supreme Court case, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76, 101 S.Ct. 1309, 1318-19 (1991) (judicial deference to state legislature reduced where local regulation "bears disproportionately" on out-of-state residents and businesses). 710 F. Supp. at 896. The same situation is present here. The permit holders being penalized are likely to be virtually all from out-of-state.

The successful plaintiffs in *Atlantic Prince* introduced legislative history and letters to the Governor emphasizing the discriminatory intent of the rule. Because the statute was held to be clearly discriminatory in its practical effect, the burden of proving the law was valid shifted to the State of New York to demonstrate that the statute served a legitimate local purpose and that it could not be served as well by available non-discriminatory means. The state failed to do so. Relying on *Maine v. Taylor*, 477 U.S. 138, the court found the law violated the Constitution and enjoined the State from enforcing the 90 foot boat vessel length limit "in any manner against any persons or entities in the world, including the plaintiffs," and ordered the state "to issue fishing licenses which it had previously denied on the grounds that issuance of such licenses violated the law" and "henceforth not to deny any fishing license on that ground." The same result should occur here. The restriction in the law to consider only California landings should be stricken and California ordered to issue permits with an allocation of trap tags at least based upon all landings associated with each particular California permit, including out-of-state landings, as well as all landings made by the same permit holder on the same licensed vessel during the control period, just as did Oregon and Washington.

EQUAL PROTECTION CLAUSE

The law's consideration of only landings made in California may also violate the Equal Protection Clause of the Constitution. That clause has been held to forbid the imposition of differential burdens on residents and non-residents of a state in order to promote local economic

development. That is not a legitimate state purpose that can survive equal protection analysis. *See generally Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

Here, strictly speaking, there is no discrimination *per se* between residents and non-residents of California. Rather, the issue is one of discrimination by state of landing, but the promotion of one economic interest group – those who landed in California at the expense of other similarly situated groups – those California permit holders who landed in Oregon or Washington – is a discrimination totally without any acceptable rational basis, especially since California expressly authorized out-of-state landings throughout the qualifying periods, exacted a special fee from permit holders to do so, and because similar pot limit allocation systems adopted by Oregon and Washington did not discriminate. Objectives to harm a politically unpopular group are not legitimate state interests. *See U.S. Dept. of Agriculture v. Marino*, 413 U.S. 528, 534, 93 S.Ct. 9821 (1973).

CONCLUSION

In sum, I think the California law is vulnerable to legal challenge, and I am optimistic that the law's consideration of only California landings when establishing crab trap limits will be determined to have been intended to benefit Californians and thereby limit the participation of out-of-state residents. That is illegal and I believe the law, or at least that provision of the law, will be struck down.

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